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IN THE

Supreme Court of the United States

October Term, 1976

No. 75-1903

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,

Petitioner,

v.

UNITED BRANDS COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 532 F.2d 231 (2d Cir. 1976). The opinion of the District Court is reported at 405 F. Supp. 884 (S.D.N.Y. 1975).[1] The District Court's Findings of

1. Earlier opinions, not directly involved in this Petition, are reported at 373 F.2d 408 (2d Cir.), *cert. denied,* 387 U.S. 921 (1967), and 358 F. Supp. 1363 (S.D.N.Y. 1973).

Fact and Conclusions of Law, which were unreported, were filed with its Opinion.[2]

Jurisdiction

Petitioner seeks to invoke the Court's jurisdiction under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on March 4, 1976. Rehearing and rehearing *en banc* were denied on April 23, 1976.

Questions Presented

The sole question raised by the Petition, apart from the attempt to disqualify one of the circuit judges, is as follows:

1. Whether this Court should review the concurrent findings of the Court of Appeals and the District Court as to purely factual matters, based largely on an assessment of the trial witness' credibility.

This question plainly does not warrant review under the rules and decisions of this Court.

Each of the questions presented in the Petition is premised on factual assertions that are directly contrary to the extensive factual findings of the District Court affirmed by the Court of Appeals.[3] Thus the Petition in essence seeks a trial *de novo* on the facts in this Court.

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2. Joint Appendix submitted by the parties on the appeal to the Second Circuit Court of Appeals, 252A-369A. Petitioner has not appended the District Court's Findings of Fact and Conclusions of Law.

3. Accordingly, the questions presented do not comply with the requirements of Rule 23(1)(c) of this Court, which provides that "The questions presented for review [must be] expressed in the terms and circumstances of the case . . . ."

Basically, the first three questions assume that United Fruit Co. (UF), predecessor to Respondent, closed its banana producing operation in western Guatemala in "maintenance of monopoly," "to impose an oppressive price" on IRCA, "to enforce a threat," and to eliminate "a major competitive source." (Pet. 2-3). All of these assumed facts are contrary to the findings below that UF's decision was premised solely on the agricultural and economic disadvantages of growing bananas in that area, and that its actions were not for monopolistic or anticompetitive purposes. (17a-23a, 48a-58a).

Question 4 assumes that UF exacted preferences from IRCA in the operation of its railroad to control competitive shipments. The actual facts are again to the contrary. Thus, the lower courts found that UF did not through coercive means or by insistence on contract terms demand preferential treatment and did not exercise control over IRCA or competitors. (24a, 26a-27a, 40a-47a).

As to Question 5, Petitioner omits the key facts that Circuit Judge Mulligan, who it is claimed should have disqualified himself, resigned from the law school board in question without attending any meetings and without ever having met the dean who was a director of Respondent; and the dean ceased being a member of Respondent's Board before the appeal was submitted. In view of the lack of any relationship between Judge Mulligan and Respondent, there is no legal question for review.

Statement of the Case

The Petition seeks review of the Second Circuit's unanimous decision affirming a judgment for defendants after trial on the merits. This is an action by Petitioner, International Railways of Central America (IRCA), against Respondent, United Brands Co., successor to United Fruit Co. (UF). The Complaint, which was filed on February 16, 1965, sought treble damages for injuries incurred during the four-year limitations period beginning February 16, 1961, as a result of alleged antitrust violations.[4]

The Parties. UF was in the business of importing bananas to the United States from Central and South America. (35a). Through its wholly-owned subsidiary, CAG, UF operated a banana plantation in western Guatemala, in an area known as Tiquisate. (35a). UF also had banana growing operations in eastern Guatemala as well as elsewhere in Central and South America. (35a, 53a). IRCA operated railways in various parts of Central America, including a line running from the western part of Guatemala, where there was no deep water port, to such a port on the Atlantic Coast. IRCA's rail line was used, among other things, to transport bananas. (35a).

The Claims. The Petition appears to seek review of two of the claims in the Complaint. The Petition principally deals with the claim (the Third Claim in the Complaint) that United's decision to close down its Tiquisate

4. The Petition does not seek review of the affirmance of a judgment for defendant on a breach of contract claim against UF (the Fifth Claim). Nor does the Petition seek review of the decision affirming judgment for defendant in a consolidated action for breach of contract which IRCA brought against UF's wholly-owned subsidiary, Compania Agricola de Guatemala (CAG).

plantation in about August 1964 was an act of monopolization in violation of Section 2 of the Sherman Act.[5] (Pet. 34-43). IRCA claims injury from the loss of UF's banana shipments, and indirectly from the loss of shipments by other producers to whom it alleges UF should have sold its Tiquisate lands, all of which, it alleges, weakened the railroad and eventually led to its takeover by the Guatemalan government some five years after UF left Tiquisate.

The other claim (the First Claim in the Complaint) is that UF, through the exercise of stock control and by contract, required IRCA to engage in discriminatory practices which allegedly diminished IRCA's business from other banana shippers. (Pet. 46).[6]

The District Court Decision. After a fourteen-day trial without a jury, the Hon. Murray I. Gurfein filed a detailed opinion (34a), together with 245 findings of fact supported by references to the testimony of the seven trial witnesses and 793 exhibits. (FF 18 at 260-61A).[7] As to the Third Claim, Judge Gurfein accepted the testimony of UF's president Sunderland and others, supported by contemporaneous documents, that the Tiquisate division was closed, not

5. The courts below found no violation of Section 1 of the Sherman Act on this claim (14a-17a, 58a; CL 1-3 at 359-60A), and Petitioner does not argue that point in its Petition. (Pet. 34-43).

6. The Second and Fourth Claims were withdrawn prior to trial. The Fifth Claim, for breach of contract, is discussed *supra* p. 4, note. The Sixth Claim, alleging the same injury as the First Claim but asserting a violation of Section 7 of the Clayton Act, is not a subject of the Petition as no mention of this claim is made in the Questions Presented and the Statement of Reasons for Granting the Writ.

7. Citations to the District Court's Findings of Fact ("FF") and Conclusions of Law ("CL") are to the Joint Appendix submitted by the parties to the Second Circuit Court of Appeals.

to eliminate competition, but rather for legitimate business reasons flowing from the agricultural, financial and political disdavantages of growing bananas in that area. (52a-55a). Having so found, the trial court concluded that it was unnecessary to decide whether imports from Guatemala constituted a relevant market or whether UF had a dominant share of any relevant market.

The District Court also found that UF did not dispose of its western Guatemalan lands in furtherance of monopolization, but rather made good faith efforts to sell the land to competitors. (55a). These efforts failed for the same agronomic and financial reasons that led UF to abandon its own efforts to engage successfully in the banana business in Tiquisate. (56a).

As an alternative ground of dismissal, the trial court rejected Petitioner's claim of injury on the facts, finding that the takeover of IRCA's railway by the Guatemalan government was not caused by acts of UF but rather by other factors, including nationalistic attacks by the Guatemalan government as well as severe labor problems. (64a-66a).

As to the First Claim, the trial judge found that UF did not exercise any control over IRCA's practices towards other banana producers during the limitations period. (40a-47a). Thus, the Court found that in 1961 UF did not vote its IRCA stock or otherwise exercise control over IRCA's independent Board of Directors; and in January 1962 UF divested itself of its IRCA stock. (40a). Moreover, the District Court found that the contracts between IRCA and UF did not require IRCA to discriminate against

other shippers; that discriminatory contracts were prohibited under a 1958 consent decree entered into by UF in a government antitrust suit; and that both UF and IRCA counsel reviewed the outstanding contracts to assure compliance with the decree. (41a). The District Court also painstakingly reviewed each of the claimed discriminatory practices by IRCA relating to wharfage charges, use of its pier and the like, and concluded that there was a failure of proof on each such allegation. (42a-47a).

The District Court further found that IRCA's practices did not cause injury to other shippers, particularly Standard Fruit—the only other shipper from western Guatemala; and hence there was no indirect injury to IRCA itself. (47a, 62a-64a). The District Court found, based on the testimony of plaintiff's former president, who was its main witness, that IRCA's allocation of railroad cars, which allegedly favored UF, never caused Standard to miss a banana cutting or a ship, and neither Standard nor IRCA ever suffered losses as a result of car allocations. (47a). The trial judge also found that Standard abandoned its western Guatemalan plantations in November 1961, not because of any act of IRCA or UF, but "so far as the unrefuted evidence shows," only for agronomic reasons, particularly a hurricane (or "blow down") which destroyed its plantations. (62a).

The Court of Appeals Decision. The Second Circuit carefully reviewed the District Court's findings and concluded that they were fully supported by the evidence and thus plainly not clearly erroneous. The Court of Appeals concurred in the trial judge's factual finding that UF's

decision to close Tiquisate was based on contemporaneous reports describing the agronomic and financial disadvantages of the area (23a), and it found "no conflicting direct testimony" on the issue of UF's legitimate motive in abandoning the Tiquisate operation. (19a). The Court of Appeals agreed that there was no proof that UF was motivated by anticompetitive considerations. (23a). In view of these findings, the Court of Appeals, like the District Court, found it unnecessary to deal with other elements of the claim relating to definition and share of relevant market.[8]

As to the disposition of Tiquisate, the Court of Appeals concurred with the District Court's findings that UF had in fact made good faith efforts to sell its lands to other banana producers, including IRCA's chairman, O. Roy Chalk, who Petitioner claims wanted to buy the land to grow bananas. (21a-23a). In this regard, the appellate court carefully examined the documentary evidence and found that it was not inconsistent with the testimony supporting these findings (*id.*).

On the First Claim, the Court of Appeals concluded that "it cannot be argued reasonably that UF-CAG through coercive means or by insistence on contract terms was demanding preferential treatment." (26a). The Court of Appeals also agreed that IRCA failed to prove injury to its business by reason of the alleged preferences. (26a).

8. The Court of Appeals noted on this issue that Petitioner's allegation that UF possessed monopoly power in the market consisting of the importation of bananas into the United States solely from Guatemala was "a dubious proposition at best," since bananas imported from all areas compete (citing Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961)). (13a-14a & n. 18).

It cited approvingly the District Court's findings as to the absence of any effect of IRCA's car allocations, including the lack of evidence of any banana car shortage and the absence of any proof that Standard ever asked IRCA for a greater share of the use of the cars owned by CAG. (26a). The Court of Appeals concurred in the District Court's conclusion that the remaining allegations of discrimination by IRCA were based on speculation. (27a).

The Basic Facts. The essential facts, as found by the District Court and affirmed by the Court of Appeals, are that in 1961 UF faced a seriously deteriorating situation both in Tiquisate and in other parts of its banana operation. Earnings had sharply declined from $58.6 million per year in 1950 to $7.2 million in 1959. (14a, 49a). A principal factor in this decline was the prevalence of Panama disease, which killed the traditional type of banana plants (Gros Michel or Cocos) and required abandonment of the lands on which they were grown. (8a, 49a). To overcome this scourge, UF developed a new variety of banana known as the "Valery," which was immune to Panama disease. (9a, 52a).

The development of the Valery enabled UF to transfer its Guatemalan production from the West Coast to the East Coast, where abandoned Panama-diseased land was available to cultivate the new variety. (18a, 52a-53a). The Valery was thin-skinned and thus vulnerable to the rigors of the rail haul via IRCA across Guatemala to the deep water port on the Atlantic. (9a, 53a). For these and other reasons, a contemporaneous study of all UF's company-

owned divisions by its agronomic and financial experts concluded that Tiquisate was the worst place to grow the Valery. (23a, 54a). This conclusion was confirmed by other contemporaneous reports as well as by unrebutted expert testimony at trial detailing Tiquisate's problems, which included a long history of unprofitability, susceptibility to wind storms (blow downs) which destroyed the banana plants, high costs of production and transportation, and political and labor strife. (9a-10a, 23a, 52a-53a; FF 143-75 at 304-24A).

UF thereupon proceeded in or about 1963 to dispose of its Tiquisate lands. UF's competitors, whom it approached, evinced a lack of interest in buying for legitimate reasons such as the agronomic problems at Tiquisate. (11a, 56a). There were no purchasers in existence with the intent or capacity to grow bananas at Tiquisate; no such purchaser was prevented from buying by UF; and UF placed no restriction on the future use of the land it sold. (11a, 19a, 55a-56a). Many of the purchasers decided to grow cotton on the land because of its agronomic advantages (*e.g.*, low growing and not subject to blow downs). In fact, there was a cotton boom going on in western Guatemala at that time and the Guatemalan government supported cotton farming and discouraged banana cultivation. (9a, 55a-56a; FF 218-20 at 339-41A).

UF also tried in good faith to sell the Tiquisate lands to O. Roy Chalk, the chairman of IRCA, but after almost a year of negotiation, Chalk never made a firm or reasonable offer. (11a, 20a-23a, 56a-57a). The deal foundered through no fault of UF but because of Chalk's reluctance, his unreasonable demands and his inability to finance the purchase. (21a-22a, 56a-57a).

Under these circumstances, it is plain that this case involves nothing more than a series of straightforward business decisions by UF, the legitimacy of which is fully explained and supported by the extensive factual findings made by the District Court and affirmed by the Court of Appeals.

ARGUMENT

POINT I

No important questions are raised by the decisions below which found against Petitioner on the facts relating to each element of its claims.

The Questions Presented in this Petition and the legal arguments advanced are all dependent upon the uncritical acceptance of Petitioner's factual assumptions. These factual assumptions, however, are directly contrary to, and inconsistent with, the 245 Findings of Fact entered by the District Court, as well as the facts found in the opinions of the District Court and the Court of Appeals.[9] As the Second Circuit summed up the case:

> "Appellant's only chance of success on this appeal depends upon a showing of clearly erroneous findings of fact. Our review shows that the findings are predomi-

9. The Petition's Statement of the Case contains numerous purported facts without "appropriate references to the appendix . . . or to the record," as required by Rules 40(1)(e) and 40(2) of this Court. Petitioner's failure to comply with these Rules is itself a basis for declining to grant certiorari. Supreme Court Rule 23(4); *see* City of Houston v. Southwestern Bell Tel. Co., 259 U.S. 318, 325 (1922).

nantly supported by the record and where they are not, cannot be termed clearly erroneous, particularly in view of the court's conviction that the UF officers' testimony was straightforward and credible. Plaintiff's case rests in sum primarily upon dubious and unsupported inferences." (32a-33a).

Petitions such as this one, asking for a retrial of factual issues adversely determined by two courts, have consistently been rejected by this Court as contrary to its standards for review. Supreme Court Rule 19(b). The applicable standard has been stated by this Court as follows:

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949).[10]

This strict test is applicable in considering whether to deny certiorari. Thus, in an opinion supporting the dismissal of a writ as improvidently granted, Justice Harlan relied on

> "the 'seasoned and wise rule of this Court' which 'makes concurrent findings of two courts below final here in the absence of very exceptional showing of error.' Comstock v. Group of Institutional Investors, 335 U.S. 211, 214 [1948]." *Rudolph* v. *United States*, 370 U.S. 269, 271 (1962).

The two-court rule is particularly applicable to this case, where the credibility of witnesses was a key factor in resolv-

10. *Accord*, United States v. Reliable Transfer Co., 421 U.S. 397, 401 n.2 (1975); Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp., 340 U.S. 147, 153 (1950); Goodyear Tire & Rubber Co. v. Ray-O-Vac Co., 321 U.S. 275, 278 (1944).

ing the factual issues in Respondent's favor. (11a, 18a-19a, 23a, 33a, 45a, 52a, 54a). As this Court has held:

> "The policy underlying the 'two-court' rule is obvious. This Court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues. When, as here, resolution of the disputed factual issues turns largely on an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court, the rule has particular force." *Berenyi* v. *Immigration Director*, 385 U.S. 630, 636 (1967).

Moreover, the witnesses, whose credibility and testimony have already been accepted by two courts, dealt with issues relating to their own intent and motives, and such issues have been held by this Court to be particularly inappropriate for its review. *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 332 (1952); *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485, 495-96 (1950).

In essence, Petitioner is asking this Court for a trial *de novo* on the issues of credibility, intent and motive. Thus, Petitioner urges this Court to review findings predicated on the testimony of witnesses whose credibility was explicitly accepted by the District Judge, who observed their demeanor, and confirmed by the Court of Appeals. (18a-19a, 51a-54a). The ground urged for this extraordinary relief is nothing more than name-calling. Thus, the Petition asserts that the UF executives, upon whose testimony many of the findings are based, were "monopolists who had gouged the American public." (Pet. 49); and that UF's research director, who testified as an expert as

well as from firsthand knowledge to the disadvantages of the Tiquisate division, is "a flim flam artist." (Pet. 23). These accusations contrast sharply with the lower courts' expressed impression "with the sincerity" of the UF witnesses who "testified lucidly about the difficult problems they were facing," leading the courts to " 'credit their testimony as supporting the legitimate motive in abandoning the Tiquisate operation in favor of other operations in other countries and in Eastern Guatemala.' " (18a-19a).[11]

Petitioner also asks this Court to review findings based on UF's contemporaneous reports and studies which the courts below found confirmed the live testimony. (23a, 51a-54a). Faced with what the Court of Appeals described as "a large amount of agronomic and financial evidence to establish that this [Tiquisate] operation was financially unsound and was the worst of all the divisions in which to produce Valery bananas" (23a, 53a), Petitioner lamely and incorrectly asserts that Respondent did not "refute plaintiff's destructive analysis" of UF's documentary evidence. (Pet. 25). In any event, this analysis, which Petitioner created solely for trial, was not known to the UF executives when they made their decision based on their own contemporaneous studies; accordingly, the lower courts correctly rejected Petitioner's proposed findings based on such post-hoc evidence. (Pet. 25-26, 23a, 53a-54a). In effect, Petitioner is asking this Court, as it did the two lower courts,

11. UF's main witness, who made the decisions in issue, was its former Chief Executive, Thomas E. Sunderland, a distinguished lawyer. Mr. Sunderland relied on his experts, who included the agronomic expert witness described by plaintiff as "a flim flam artist," Mr. van Diepen, UF's director of research (University of Toronto, B.S. in Agriculture; Louisiana State University, M.S. in Agronomy. (Tr. 1223 at A 1859)). It is noteworthy, as the Court of Appeals observed, that Petitioner called no agronomic expert of its own to testify. (23a).

to second-guess UF's decision to close the Tiquisate division. However, all of the allegedly conflicting documentation cited in the Petition was submitted to the lower courts, which carefully assessed its weight and rejected it in favor of the testimony and records offered by UF.

The extensive factual findings by the two courts below, supported by a mass of testimonial and documentary evidence, are fatal to Petitioner's case on the key element of the alleged violation asserted in the Third Claim—"the willful acquisition or maintenance of [monopoly] power." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).[12] Thus, UF, in closing Tiquisate, was found not to have the "intent and purpose to exercise [monopoly] power," and thus did not willfully monopolize in violation of Section 2. *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809 (1946); *United States* v. *Grinnell Corp.*, *supra*, at 576 & n.7. (12a, 18a n.20; 54a-58a; CL 5, 6, 11 at 360-61A, 363A).[13] As the Court of Appeals astutely noted, the abandonment of "an unprofitable and uncomfortable operation . . . cannot possibly be characterized as an act of monopolization." (13a).

Moreover, as we have shown, *supra* page 8, with regard to the First Claim, the Court of Appeals, as well as the District Court, found as a matter of fact that UF did

12. As noted, p. 6, *supra*, the District Court alternatively found against Petitioner on the issue of injury on the Third Claim. (64a-66a).

13. These ultimate findings were supported by numerous detailed findings, each accompanied by citations to the record evidence, describing the agronomic, financial, political and other problems leading to the decision to close the division. (FF 129-176 at 297-324A).

not through coercive means or insistence on contract terms demand preferential treatment from IRCA; and that in any event, the allegedly preferential practices did not adversely affect competitive shippers, and hence did not even indirectly cause injury to IRCA, as required by Section 4 of the Clayton Act (15 U.S.C. § 15). (26a, 31a-32a, 43a-44a, 47a, 62a-64a; FF 29-128 at 265-96A).

It is thus clear that this Petition raises only factual issues which have already been resolved against Petitioner by two courts. Accordingly, under the governing rules and authorities, the Petition is not within the proper scope of Supreme Court review. Certiorari should, therefore, be denied for lack of any important legal issue.

POINT II

Circuit Judge Mulligan's refusal to disqualify himself, which was proper under the applicable statute and canons, raises no important question for review.

Petitioner seeks review on the ground that one of the three members of the unanimous Second Circuit panel should have disqualified himself.

The facts are that on April 8, 1975, Judge Mulligan wrote to the Director of Planning of Touro Law School, a new school then being developed, withdrawing as a member of the Board of Visitors because he believed the project was dead as a result of financial problems and he had taken on other extracurricular activities. (98a). Two days later,

the New York Law Journal erroneously reported that Judge Mulligan had been appointed to the Touro Board. (87a). The article also reported correctly that Maurice C. Kaplan, a director of United Brands, was appointed Dean of Touro Law School. (87a). On August 18, 1975, Mr. Kaplan's term as director expired (88a) and he did not stand for re-election.

On September 9, 1975, Petitioner requested that Judge Mulligan disqualify himself from sitting on this appeal. (87a). On October 8, Judge Mulligan denied the request, pointing out that he had never attended any meetings of the Touro Board; to his knowledge there were no such meetings; he did not participate in any way in the election of Mr. Kaplan as dean, and to the best of his knowledge he had never even met Mr. Kaplan or been associated with him in any capacity. (89a-90a). In addition, by this time Mr. Kaplan was no longer an officer or director of United Brands.

Petitioner does not deny that in fact there was no relationship between Judge Mulligan and Mr. Kaplan. Rather, Petitioner contends that the newspaper article, although inaccurate, was sufficient to warrant disqualification. (Pet. 47). This unprecedented position is contrary to the purpose of the applicable statute and canon which look to "all the circumstances"—not erroneous fragments in a newspaper article—when assessing impartiality.

Section 455(a) of the Judicial Code, as amended in 1974, provides that "[a]ny . . . judge . . . of the United States shall disqualify himself in any proceeding in which his im-

partiality might reasonably be questioned.'"[14] This amendment was enacted expressly for the purpose of "making the statutory grounds for disqualification of a judge in a particular case conform generally with the recently adopted canon of the Code of Judicial Conduct, which relates to disqualification of judges for bias, prejudice, or conflict of interest."[15]

Section 455(a) "has been authoritatively explained by the reporter for the American Bar Association Committee that drew the Code of Judicial Conduct from which it is taken:

> 'Any conduct that would lead a reasonable man *knowing all the circumstances* to the conclusion that the judge's "impartiality might reasonably be questioned" is a basis for the judge's disqualification.' "[16] (Emphasis added.)

14. 28 U.S.C. § 455(b) lists specific causes of disqualification, none of which is applicable here. Petitioner erroneously quotes the old § 455 (Pet. 47), which is inapplicable to appellate review of this proceeding. Section 3 of the new law provides that it "shall not apply . . . to appellate review of any proceeding which was fully submitted to the reviewing court prior to the date of this Act [December 5, 1974]." (Pub. L. No. 93-512, § 3, 88 Stat. 1609 (1974), *amending* 28 U.S.C. § 455 (1968)). This appeal was not fully submitted to the reviewing court until after December 5, 1974 and thus the new § 455 is applicable here.

15. HOUSE REPORT (Judiciary Committee) No. 93-1453 (to accompany S. #1064), 93d Cong., 2d Sess. 1 (Oct. 9, 1974) (3 U.S. CODE CONG. & ADM. NEWS 74-143 at 6351); SENATE REPORT (Judiciary Committee) No. 93-419 (to accompany S. #1064), 93d Cong., 1st Sess. 1 (Oct. 3, 1973).

16. 13 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE § 3549, at 370 (1975), quoting THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT, 1973, p. 60, concerning Canon 3(C)(1), which is the counterpart of Section 455(a), and provides that "[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned . . . ." (ABA CODE OF JUDICIAL CONDUCT, Canon 3(C)(1)).

Applying this standard to the circumstances here, a reasonable man knowing that Judge Mulligan had resigned from the Touro Board before attending any sessions or even meeting Mr. Kaplan, could not conceivably question his impartiality.

It is thus unnecessary to reach the question of whether the facts as erroneously reported in the Law Journal would warrant disqualification if they had been correct. Even then, it is not reasonable to conclude that a circuit judge would be biased towards a corporation merely because the dean of the school to whose board he had been appointed was a director of that corporation.[17]

Judge Mulligan's refusal to disqualify himself was plainly proper under the applicable statute and canons. Since there was no relationship between Judge Mulligan and Respondent, there is no question warranting review.

17. *See* MacNeil Bros. Co. v. Cohen, 264 F.2d 186, 189 (1st Cir. 1959) (holding that a circuit judge was not disqualified under former § 455 by reason of his activity as a lecturer at Harvard Law School under Dean James Landis, who was a law partner of the defendant in the pending action); Weiss v. Hunna, 312 F.2d 711 (2d Cir.), *cert. denied*, 374 U.S. 853 (1963) (holding under former § 455 that, "Quite apart from [the judge's] statement that he does not know the defendant, professional relationships of this sort [membership and attendance at meetings of the same international legal association] do not reach the level where considerations of disqualification arise." (312 F.2d at 714)).

Conclusion

The Petition presents only questions of fact as to which the two courts below made extensive findings that are supported by their acceptance of the credibility of the trial witnesses and a mass of documentary proof. Accordingly, no important questions are presented and the Petition should be denied.

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Respectfully submitted,

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